WASHINGTON STATE DEPARTMENT OF
Natural Resources

PETER GOLDMARK
Washington State Commissioner of Public Lands

MEMORANDUM

DATE: January 29, 2016

TO: Forest Practices Board

FROM: Hans Berge, Adaptive Management Program Administrator

SUBJECT: Adaptive Management Program Quarterly Staff Report

This update includes a summary of work to date on work elements focused on contributing to a permanent water typing rule by the November 2016 Board Meeting. The summary on the pilot LiDAR hydrologic model evaluation, best practices of electrofishing in protocol surveys, and off-channel habitat projects are described below.

Model Evaluation

The Forest Practices Board directed the Adaptive Management Program Administrator "to scope and initiate a pilot project to re-run the existing hydrologic model using LiDAR data, including at least two watersheds; one westside and one eastside" at the 11 February 2014 Board Meeting. This fall I worked with the University of Washington Precision Forestry Cooperative to develop a scope of work and contract to start the analysis as directed by the Board. The two pilot basins identified for the pilot project are the Mashel (westside) and Darland Mountain (eastside) Watershed Analysis Units. The work has begun and is on track for completion by 30 June 2016.

Type F: Protocol survey electrofishing

Since August, I have been working with TFW Policy to convene a technical group to provide Policy with a recommendation in response to the Board's motion from 11 February 2014 on best practices related to the use of protocol survey electrofishing. I convened a technical subgroup composed of stakeholders and subject matter experts to be responsive to the needs of Policy. Regular meetings have been held since 5 October, and the group is preparing the recommendations now. This group plans to produce a memo for Policy by April that provides guidance in addressing the Board's motion as well as recommendations on areas of improvement in protocol surveys overall.

Type F: Off-channel habitat

In September 2015, TFW Policy submitted a Proposal Initiation to the AMPA asking for a recommendation on addressing off-channel habitat of Type F waters. In response to the motion, I recommended that both *policy* and *science* tracks would be necessary to resolve the topics contained in the proposal. The *policy* track focuses upon the language contained in *WAC 222-16-031, while the *science* track will require a technical review of the definitions currently used in identifying off-channel habitat. The technical group is being formed and I expect both tracks to be completed before July 2016.

WASHINGTON STATE DEPARTMENT OF
Natural Resources

PETER GOLDMARK
Commissioner of Public Lands

MEMORANDUM

January 28, 2016

TO: Forest Practices Board

FROM: Marc Ratcliff
Forest Practices Policy Section Manager

SUBJECT: Board Manual Development Update

Section 16, *Guidelines for Evaluating Potentially Unstable Slopes and Landforms*
A status update will be provided to the Board on the qualified expert's discussion regarding requested additional materials for inclusion into this section of the board manual at the February meeting. DNR is not asking for Board action.

Section 21, *Guidelines for Alternate Plans*
DNR staff will distribute a draft of this section of the board manual for Board review and approval at the May 2016 meeting. The manual is being amended to restore a part of this section inadvertently left out after the Board's approval of other amendments to the section in 2008. The part being restored is previously Board approved stakeholder developed guidance for restoring riparian functions in forests having a high risk of mortality from fire or disease. This section will be distributed to Board members prior to the May meeting.

Other amendments may occur later in 2016, but are dependent on the Board's rule making timeline and completions of TFW Policy Committee's work load.

Please feel free to contact me with any questions at 360.902.1414, or marc.ratcliff@dnr.wa.gov.

MR

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MEMORANDUM

TO: Forest Practices Board

FROM: Garren Andrews, Compliance Monitoring Program Manager

SUBJECT: Current status of the Compliance Monitoring Program

2016 field season will begin in February.

Compliance Monitoring stakeholder committee meeting will be held Thursday, February 18th.

2014-2015 data analysis ongoing.

Trend analysis ongoing.

If you have any questions please contact me at (360) 902-1366 or garren.andrews@dnr.wa.gov

GA/

WASHINGTON STATE DEPARTMENT OF
Natural Resources

PETER GOLDMARK
Commissioner of Public Lands

MEMORANDUM

January 11, 2016

TO: Forest Practices Board

FROM: Tami Miketa, Manager, Forest Practices Small Forest Landowner Office

SUBJECT: Small Forest Landowner Office and Advisory Committee

Small Forest Landowner Advisory Committee (SFLAC)
Since my last staff report, the Small Forest Landowner Advisory Committee met on November 17, 2015 and January 5, 2016. Issues discussed and presented included:

- SFLO Stewardship Grant Proposals
- Discussion of a sample alternate plan for SFLOs
- Update on WFFA template
- WFFA's overview of ID team process
- Changes being made to Oregon Riparian Management Area prescriptions
- Short and long term goals for SFLAC

Forestry Riparian Easement Program (FREP)
For the FY 15-17 biennium, the Forestry Riparian Easement Program received $3.5 million from the State Capital Budget. There are now 135 forestry riparian easement applications on the list waiting for compensation. The oldest application on the list was submitted to the SFLO on 6/28/2008. The Program hopes to cruise and value these 135 FREP easement applications that are on the waiting list and to purchase 45 conservation easements encompassing approximately 430 acres.

The SFLO recently received approval to hire two project Natural Resource Specialists. These positions will help the program by overseeing the cruising contracts for the 135 easements on the waiting list.

Rivers and Habitat Open Space Program (R&HOSP)
The State Capital budget appropriated the R&HOSP $1 million for the FY15-17 biennium. The Small Forest Landowner Office has opened the application solicitation period, and will remain open until March 21, 2016. Generally, when the funding level exceeds $1 million, DNR expects to allocate approximately 70 percent of the funds for critical habitat and 30 percent for channel migration zones (CMZs). If the demand is limited in either funding category, DNR may shift moneys between the funding categories. Applications will be funded in order of ranked priority until all funds are expended. All remaining eligible applications will be offered the opportunity to be considered for future funding.

After the application period closes, applications will be prioritized for funding based on, but not limited to, the following elements:

- The habitat quality of the property
- Risk of future habitat loss
- Documented occupancy
- Species' landscape continuity
- Species diversity

To qualify for a conservation easement under the Rivers and Habitat Open Space Program, your property must be:

- Located on forestland containing at least one of two habitat styles:
    - Critical habitat for state threatened or endangered species that has been designated a particular concern by the Forest Practices Board;
    - A specific type of river habitat called a Channel Migration Zone as described in the Forest Practice Rules and Forest Practices Board Manual Section 18.
- Identified as either "designated forestland" or "current use forestland" on county assessor records, and
- Free of unacceptable liabilities such as hazardous substances or other site conditions that may jeopardize the preservation of fisheries enhancement or ecological protection of the project area.

Family Forest Fish Passage Program (FFFPP)

The State Capital budget appropriated $5 million to the Family Forest Fish Passage Program for the FY15-17 biennium. In the 2016 field season, the FFFPP will be correcting 20 fish passage barriers opening up approximately 50 miles of habitat for fish.

Long Term Applications (LTA's)

There are now a total of 205 approved long term applications; which is an increase of 6 approved applications since the end of the last reporting period (10/12/2015).

LTA Applications	LTA Phase 1	LTA Phase 2	TOTAL
Under Review	4	2	**6**
Validated	22	0	**22**
Approved	3	205	**208**
TOTAL	**29**	**207**	**236**

Upcoming Landowner Events

The WSU Forestry and Wildlife Extension program, in coordination with DNR, provides education and information about forest management to private forest landowners as well as the general public. They offer classes, workshops, and field days as well as publications, videos, and online resources to help landowners achieve their various land management objectives. Below is a list of upcoming events designed to aid small forest landowners.

Forest Stewardship Coached Planning - WSU's flagship class will teach you how to assess your trees, avoid insect and disease problems, attract wildlife, and take practical steps to keep your forest on track to provide enjoyment and even income for years to come. In this class you will develop your own Forest Stewardship Plan, which brings state recognition as a Stewardship Forest and eligibility for cost-share assistance, and may also qualify you for significant property tax reductions.

- Vashon Island, March 2 – April 20, 2016
  Class session 6:00 – 9:00 PM Wednesday evenings
  Vashon Land Trust Building

- Everett, March 29 – May 17, 2016
  Class session 6:00 – 9:00 PM Tuesday evenings
  WSU Snohomish County Extension Cougar Auditorium

- Deming, September 15 – November 3, 2016
  Class session 6:00 – 9:00 PM Thursday evenings
  Location TBD

- Preston, September 27 – November 15, 2016
  Class session 6:00 – 9:00 PM Tuesday evenings
  Preston Community Center

Small Forest Landowner Office Outreach and Grant Opportunities

The Small Forest Landowner Office currently has a vacancy for the Outreach Specialist/Grant Writer position. We are currently reviewing the duties of this position and the needs of the Office and will fill this position as soon as possible.

The Small Forest Landowner Office/Forest Stewardship Program recently received a grant from the USDA Forest Service's State & Private Forestry Landscape Scale Restoration Grant Program. This grant will create a Landscape Scale Master Forest Stewardship Plan and expand small forest landowner educational programs (e.g., Forest Owners Field Days, Forest Stewardship Coached Planning Courses, etc.) in the Upper and Lower Chehalis Basins. The master plan will combine general and forestry specific information about the basin to be used as a template for stewardship plans tailored to individual ownerships. The grant dollars appropriated to DNR is $300,000. The partners in this grant are WSU Extension, Grays Harbor Conservation District, and WA Farm Forestry Association. It is expected this grant will begin to be administered some time this spring.

Please contact me at (360) 902-1415 or tamara.miketa@dnr.wa.gov if you have questions.
TM/

Cultural Resources Roundtable

January 21, 2016 MEMORANDUM

To: Forest Practices Board

From: Timber/Fish/Wildlife Cultural Resources Roundtable Co-Chairs

Jeffrey Thomas, Puyallup Tribe of Indians

Karen Terwilleger, Washington Forest Protection Association

RE: Timber/Fish/Wildlife Cultural Resources Roundtable - February 2016 Quarterly Report to the Forest Practices Board

The TFW Cultural Resources Roundtable (Roundtable) is pleased to submit this latest report to the Forest Practices Board (Board). During the past quarter, the Roundtable has focused on stakeholder perspectives on Forest Practices conditioning authority, which is also a reflection of how well the WAC 222-20-120 is working. Four memos have been produced that reflect different stakeholder's perspective. From those memos, "Tentative Consensus Points" and "Tentative Points of Difference" were identified. The memos and list of points are attached along with the regular updated "Action Item" list.

We look forward to your February 10, 2016 meeting and answering any questions you may have. In the meantime, please do not hesitate to contact us:

Jeffrey.thomas@puyalluptribe.com and (253) 405-7478

kterwilleger@wfpa.org and (360) 352-1500.

Cultural Resources Roundtable 1/19/16

Forest Practices Application (FPA) Conditioning Collaboration

Tentative Consensus Points

- Protecting cultural resources is critical to the tribal way of life ("cultural resources" as defined by the tribes? By the Timber/Fish/Wildlife's Cultural Resource Protection and Management Plan?)
- Protecting archaeology is regulated by law
- Current laws and regulations do not effectively address the full breadth of cultural resources as identified/prioritized by the tribes.
- Educating all stakeholders is an essential component of cultural resources protection, which needs priority attention
- Pre-project resource assessment before submitting Forest Practices proposal is the preferred approach for evaluating risk.

Tentative Points of Difference

- Tribal/landowner meetings:
    - Required vs. voluntary
    - Triggering mechanism(s)
    - (In)consistency
- Using DAHP predictive model as a solution
- Using legislation as a solution
- Tribal access & inventorying of cultural resources when found
- Pre-project assessment and subsurface sampling expectations/process
- Differences in the problem statement

Actions in Progress

- Inadvertent discovery language will be included in the FPA.

*This collaboration document is based in the conditioning memos submitted by the Department of Archaeological and Historic Preservation, Yakama Nation, Washington Forest Protection Association/Washington Farm Forestry Association, Assistant Attorney General Phil Ferester and the 1/19/16 meeting of the Cultural Resource Roundtable (not all members present).

Washington Farm Forestry Association (WFFA) and Washington Forest Protection Association (WFPA)

- WFFA and WFPA are committed to abiding by all applicable current laws and regulations pertaining to forest practices and cultural resources.

- Forest landowners represented by WFFA and WFPA are committed to protection of and care about all cultural resources that exist on our lands; this commitment is part of our larger commitment as stewards of the land.

- WFFA and WFPA recommend that the Cultural Resources Roundtable (Roundtable) make a concerted, focused effort to concisely identify and clearly articulate (with written problem statements) the specific issues / problems that Roundtable participants have with current cultural resource protection in the forest environment in the State of Washington.

- WFFA and WFPA contend that until such a thorough, consensus-driven problem / issue identification process for cultural resource protection has been completed, development of / discussion about implementing problem-solving recommendations is premature and may not address actual issues / opportunities for adequately protecting cultural resources.

- WFFA and WFPA also remain committed to working with the Roundtable to develop appropriate guidance and training, and providing effective outreach to forest landowners to assist them in understanding the forest practices rules related to identifying and protecting cultural resources.

Steve Barnowe-Meyer 12-11-15/Karen Terwilleger 12-11-15

Allyson Brooks Ph.D., Director
State Historic Preservation Officer

December 8, 2015

To: Cultural Resources Roundtable

From: Allyson Brooks, Ph.D., Director
State Historic Preservation Officer

Re: DAHP Review of Forest Practice Permits

Background

- The Department of Archaeology and Historic Preservation has the authority under RCW 27.53 and corresponding WACs, to require a permit when an archaeological, historic archaeological site and/or human remains/burials are altered, removed, dug into or excavated.
- In order to streamline processes, the agency considers a Memorandum of Agreement developed under Section 106 of the National Historic Preservation Act to stand in lieu of an archaeological permit, and until recently, a management/protection plan for cultural resources under the authority of DNR's Forest Practice Permit.

Problem

- The agency was informed by DNR that DNR cannot enforce activities that are not operational conditions of a permit, or that are part of a cultural resource management plan not provided to DNR as part of an application.
- Cultural Resources are not a public resource under the Forest Practice Act.

Current Process

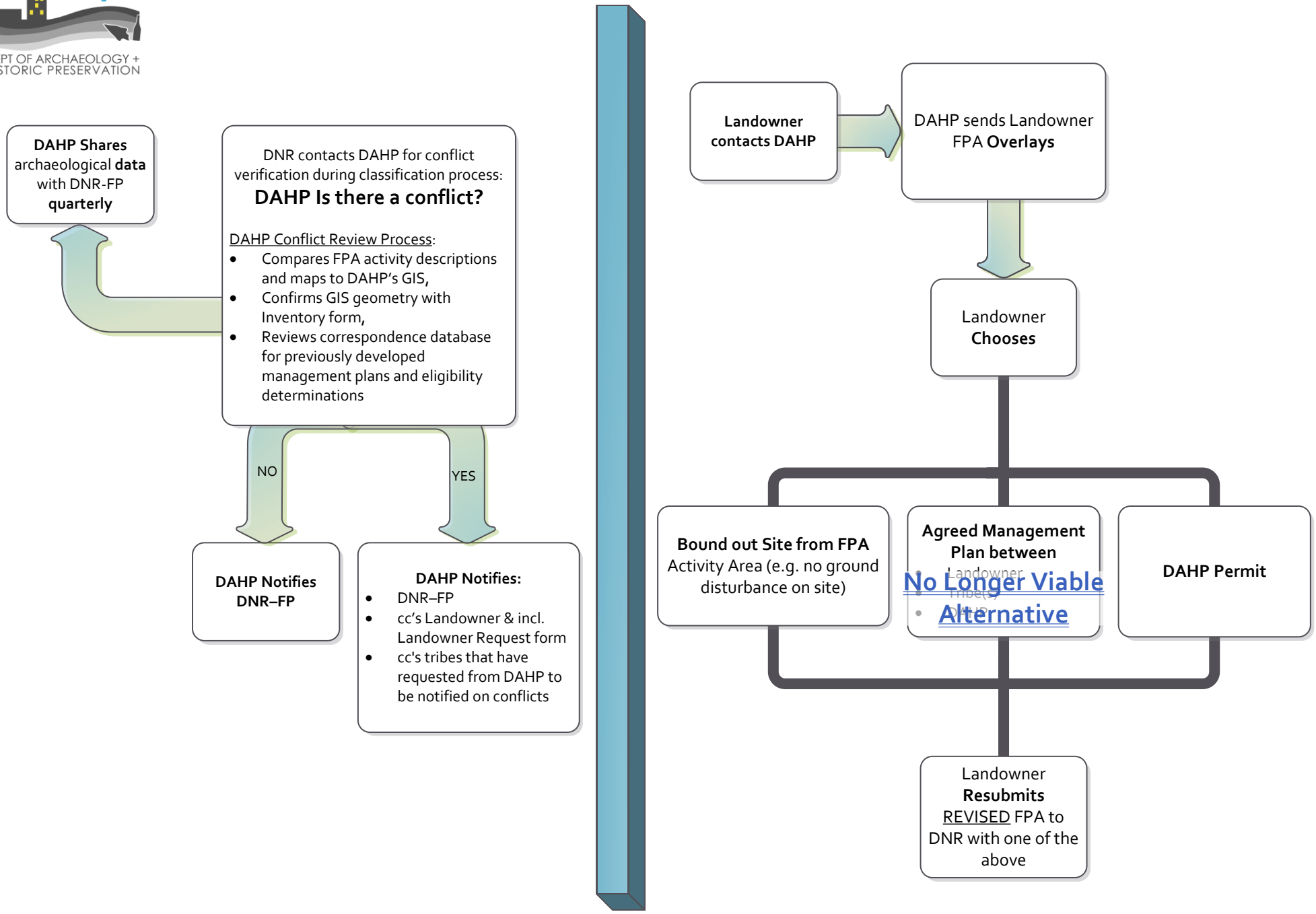
- DAHP shares buffered cultural resource data with DNR on a quarterly basis
- DNR staff notifies DAHP when there is conflict in a FPA with a known site defined above.
- DAHP confirms the existence of a spatial overlap in the information provided.
- DAHP notifies DNR and the landowner, and tribes (as requested), of the conflict.
- DAHP provides information to the landowner on potential avoidance methods and landowner contacts DAHP.
- Landowner voluntarily adjusts FPA to avoid site, or must apply for a DAHP permit.
- Landowner may also go through SEPA. The DAHP will review the permit under SEPA and respond to DNR whether the applicant requires a permit.

Potential solutions to enforcing management/protection plans

- Place cultural resources as a public resource in Forest Practice Act.
- Continue current process of requiring a permit from DAHP understanding management/protection plans cannot be enforced by DNR.

Note: DAHP AAG has opined that WACs to enforce management/protection plans cannot be established until cultural resources are identified as public resources under the RCW.

DAHP's Forest Practice Application Workflow



No Longer Viable Alternative

Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

According to Phil Ferester's Opinion: Forest Practices Division's Conditioning Authority

- The Forest Practices Act, RCW 76.09, does not include cultural resources as a public resource; therefore all rules adopted to protect cultural resources are unenforceable. The exception is class IV forest practices applications that are subject to SEPA.
- The promises made to Tribes in the Timber, Fish and Wildlife (TFW) Agreement of 1987 to inventory, evaluate, preserve and protect traditional cultural and archaeological spaces and assure Tribal access is unenforceable.
- The TFW Roundtable's Charter to identify, protect, and manage cultural resources that are significant to the history and cultures of the people of Washington State located on the state's non-federal forest lands is unenforceable.
- Plans agreed to between Landowners and Tribes are unenforceable, except when defined in other rules.
- The agreement to ensure cultural resource protection is accomplished is empty and meaningless.

Solution

- Forest Practices Division must draft and support legislation that gives the Forest Practices Division the authority to protect Tribal cultural resources at the same level as public resources in the Forest Practices Act, RCW 76.09.
- The legislation must ensure the following proposed solutions supported by at least nine federally recognized Tribes be enforceable:
  1) Restore WAC 222-20-120(4) with the "may" changed to "shall". Instruct all Regions to consistently make plans agreed to between Tribes and landowners an FPA condition when requested.
  2) Instruct all Regions to consistently require meetings under WAC 222-20-120(2) when Tribes appropriately use WAC 222-16-050(5)(k) to identify cultural resources.
  3) Insert incidental discovery language into every approved FPA.
  4) Use the DAHP predictive model to screen every FPA. High Risk and Very High Risk areas shall trigger a required professional survey to "inventory archaeological/cultural spaces". Consultation with local Tribes will be required.
  5) When archaeological and cultural sites are discovered professionals shall "inventory, evaluate" and make recommendations to "preserve and protect" in consultation with local Tribes.
  6) "Assure Tribal access" to Tribally significant areas in "managed forests" through binding consultation between affected Tribes and landowners.

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M E M O R A N D U M

DATE: June 10, 2015

TO: Stephen Bernath, Chair, and the Forest Practices Board

FROM: Philip M. Ferester, Senior Counsel
Natural Resources Division

SUBJECT: **Open Primer on Forest Practices Act Conditioning Authority**

INTRODUCTION

The Forest Practices Board (Board) passed a resolution at its May 12, 2015, quarterly meeting that requested a short, public memorandum on conditioning authorities under the Forest Practices Act. This request came about because of current issues before the Board's Cultural Resources Roundtable, and a proposal suggesting that the Board change "may" to "shall" in WAC 222-20-120(4).

This memorandum provides a brief open primer on Board rule making and DNR conditioning authority. The memorandum starts with general concepts of administrative law and the scope of administrative authority. That provides a foundation for reviewing past forest practices cases addressing conditioning and a foundation from which various entities might explore lawful ways to address cultural resource issues either through the Forest Practices Act structure or elsewhere.

While this memorandum reflects my own legal judgment as counsel to the Board, it is not an official opinion of the Attorney General's Office.

ANALYSIS

A. The Statutory Framework of the Forest Practices Act Establishes the Subjects That May Be Regulated By the Board and DNR.

A fundamental aspect pertaining to the authority of any administrative agency is the statutory structure under which they operate. "The Board has only those powers expressly granted to it and those powers necessarily implied from its statutory delegation of authority." Att'y Gen. Op. 1, at 5 (2015). An agency has implied authority to carry out a task "where an agency is

charged with a specific duty, but the means of accomplishing that duty are not set forth by the Legislature." *Tuerk v. Dep't of Licensing*, 123 Wn.2d 120, 124-25, 864 P.2d 1382 (1994). From these general concepts, some key provisions in the Forest Practices Act (FP Act) will be explored.

1. Board's Forest Practices Act Authorities.

The Board's primary rule-making responsibilities are established in RCW 76.09.040(1)(a). The Legislature directed the Board as follows:

> *Where necessary to accomplish the purposes and policies stated in RCW 76.09.010*, and to implement the provisions of this chapter, the board shall adopt forest practices rules pursuant to chapter 34.05 RCW and in accordance with the procedures enumerated in this section that:
>
> (i) Establish minimum standards for forest practices; . . . [and]
>
> (iii) Set forth necessary administrative provisions; . . . .

RCW 76.09.040(1)(a)(i) and (iii) (emphasis added). RCW 76.09.010 thus directly bears upon the scope of the Board's rule-making authority. RCW 76.09.010(2) sets forth the purposes and policies of the Forest Practices Act:

> The legislature further finds and declares it to be in the public interest of this state to create and maintain through the adoption of this chapter a comprehensive statewide system of laws and forest practices rules which will achieve the following purposes and policies:
>
> (a) Afford protection to, promote, foster and encourage timber growth, and require such minimum reforestation of commercial tree species on forest lands as will reasonably utilize the timber growing capacity of the soil following current timber harvest;
>
> (b) Afford protection to forest soils and public resources by utilizing all reasonable methods of technology in conducting forest practices;
>
> (c) Recognize both the public and private interest in the profitable growing and harvesting of timber;
>
> (d) Promote efficiency by permitting maximum operating freedom consistent with the other purposes and policies stated herein;

> (e) Provide for regulation of forest practices so as to avoid unnecessary duplication in such rules;
>
> *(f) Provide for interagency input and intergovernmental and tribal coordination and cooperation*;
>
> (g) Achieve compliance with all applicable requirements of federal and state law with respect to nonpoint sources of water pollution from forest practices;
>
> (h) To consider reasonable land use planning goals and concepts contained in local comprehensive plans and zoning regulations;
>
> *(i) Foster cooperation among managers of public resources, forest landowners, Indian tribes and the citizens of the state*;
>
> (j) Develop a watershed analysis system that addresses the cumulative effect of forest practices on, at a minimum, the public resources of fish, water, and public capital improvements of the state and its political subdivisions; and
>
> (k) Assist forest landowners in accessing market capital and financing for the ecosystem services provided to the public as a result of the protection of public resources.

RCW 76.09.010(2)(a)–(k) (emphasis added). These policies establish the parameters for proper Board rule making. The two italicized provisions address working with Indian tribes on forest practices applications and promoting cooperation. The FP Act and rules strongly focus upon the protection of "public resources," pursuant to RCW 76.09.010(2)(b). "Public resources" includes "water, fish, wildlife, and capital improvements of the state or its political subdivisions." RCW 76.09.020(25).[1]

"Cultural resources" is a term not found in the FP Act. That means that cultural resources are not a regulatory focus that the Legislature assigned to the Board or to DNR, beyond promoting cooperation between landowners and Indian tribes.[2]

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[1] The protection of water quality through the protection of public resources carries extra significance as a regulatory purpose behind the FP Act because it provides the means of Washington's compliance with federal non-point source water pollution laws on forest lands. *See* RCW 90.48.420(1); RCW 77.85.180(2).

[2] Agreements like TFW inform the interpretation of many Board rules and promote cooperation among resources managers, landowners, and tribes. However, those agreements do not expand the regulatory authority of either the Board or DNR. That authority can only be set or established by the Legislature.

The Board must act within its statutory authority when it adopts rules. Rules adopted in excess of an agency's statutory authority may be stricken under the Administrative Procedure Act.[3]

2. DNR Forest Practices Act Conditioning Authorities.

DNR administers the regulatory programs created under the FP Act and rules. RCW 76.09.040(1)(c). DNR's conditioning authority is not exhaustively set forth in the FP Act. In RCW 76.09.050(4), the Legislature indicated that "forest practices shall be conducted in accordance with the forest practices regulations, orders and directives as authorized by this chapter or the forest practices regulations, *and the terms and conditions of any approved applications*." RCW 76.09.050(4) (emphasis added). This is a strong indication that the Legislature anticipated that applications may include some conditions.[4]

DNR also has important enforcement authority regarding issued permits that further emphasizes its conditioning authority to protect public resources. As will be discussed in greater detail below, the quasi-judicial agencies that review DNR's regulatory decisions under the FP Act have found that DNR's authority to issue Stop Work Orders or Notices to Comply to prevent actual or potential damage to public resources provides an additional statutory basis for site-specific application conditioning to protect public resources.[5]

Importantly, DNR's authority is limited to site-specific circumstances. DNR does not have the authority to adopt rules under the FP Act. That authority rests with the Forest Practices Board, as discussed above. Should DNR attempt to impose uniform conditions on all sites having a particular issue, that would be considered a rule under the Administrative Procedure Act, and conditions imposed in that manner would be invalidated.[6]

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[3] RCW 34.05.570(2)(c); *Edelman v. State ex rel. Pub. Disclosure Comm'n*, 152 Wn.2d 548, 99 P.3d 386 (2004) (rule in excess of statutory authority invalid; agency cannot promulgate a rule that amends or changes a statute).

[4] Washington courts have expressly held that "'the power to disapprove a permit necessarily includes the power to condition an approval.'" *State v. Crown Zellerbach Corp.*, 92 Wn.2d 894, 899, 602 P.2d 1172 (1979), quoting *S. Pac. Co. v. Olympian Dredging Co.*, 260 U.S. 205, 208 (1922). *Crown Zellerbach* involved a criminal gross misdemeanor charge associated with the violation of conditions on a hydraulic project approval by the Department of Game for a timber harvest. The permit conditions required cut logs to be yarded over a fish-bearing stream named Williams Creek (in Pacific County). *Crown Zellerbach*, 92 Wn.2d at 897-98.

[5] DNR may issue Stop Work Orders under RCW 76.09.080 and Notices to Comply under RCW 76.09.090.

[6] RCW 34.05.010(16); *Failor's Pharmacy v. DSHS*, 125 Wn.2d 488, 495-98, 866 P.2d 147 (1994) (invalidation of action of general applicability when not based upon a rule adopted under the APA's process); *SDS Lumber Co. v DNR*, FPAB 92-27, Final Findings of Fact, Conclusions of Law, and Order, Conclusion Nos. 3-5 (1992) (reliance upon general guidance memorandum concerning Northern spotted owl as rule was improper).

While a permitting agency generally has the authority to condition its permit as discussed in note 4, this does not mean the agency has carte blanche to require *any* conditions. Rather, the conditions imposed must still be tethered to the agency's underlying regulatory purpose established by the Legislature. This concept will become more apparent in Section B of this memorandum.

3. DNR SEPA Authority.

Applications under the FP Act must go through the State Environmental Policy Act (SEPA) process if they fit the criteria for Class IV.[7] WAC 222-16-050(1)(f) designates some forest practices as Class IV-Special if they affect particular archaeologic or historic resources, as follows:

> (i) Archaeological sites or historic archaeological resources as defined in RCW 27.53.030; or
>
> (ii) Historic sites eligible for listing on the National Register of Historic Places or the Washington Heritage Register as determined by the Washington state department of archaeology and historic preservation; or
>
> (iii) Sites containing evidence of Native American cairns, graves, or glyptic records as provided for in chapters 27.44 and 27.53 RCW. The department of archaeology and historic preservation shall consult with affected Indian tribes in identifying such sites.

WAC 222-16-050(1)(f). Activities that would otherwise be Class IV-Special may avoid that designation and the SEPA process if the landowner voluntarily implements certain protection strategies. WAC 222-16-050(1)(f)(iv).

Applications subject to SEPA require additional information called a "SEPA Checklist," to help make what is called a "threshold determination."[8] The SEPA Checklist includes an area of inquiry into historic and cultural resource preservation.[9] If a proposal receives a threshold "determination of significance" because it will likely have significant adverse environmental impacts, an environmental impact statement (EIS) must be prepared to discuss the impacts,

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[7] RCW 76.09.050 (1); RCW 43.21C.037(3).

[8] WAC 197-11-310; WAC 197-11-315; and WAC 197-11-330(1). The SEPA Checklist is set forth in WAC 197-11-960.

[9] SEPA Checklist, question 13. Proposals subject to SEPA due to a different provision in WAC 222-16-050(1) or (2) must also complete this part of the SEPA Checklist.

alternatives to the proposal that might reduce the impacts, and ways that the impacts may be mitigated.[10]

If a particular forest practices proposal will cause significant adverse impacts, DNR has additional conditioning authority that it may exercise under SEPA to address the specific, adverse environmental impacts identified in the SEPA Checklist or EIS.[11] If the impacts can be mitigated to an insignificant level, a mitigated determination of non-significance may be issued in lieu of an EIS.[12] Some Forest Practices Board rules articulate how DNR should exercise its authority under SEPA for particular environmental issues.[13]

B. Decisions Addressing Conditioning Authority Find DNR Has Limited, Site-Specific Conditioning Authority to Protect Public Resources.

The Pollution Control Hearings Board (PCHB) has authority to review whether DNR appropriately conditioned or failed to condition any application.[14] Although WAC 222-20-120(4) indicates that DNR "may condition the application in accordance with the plan" negotiated between a landowner and tribe, no case interprets this requirement.[15]

The PCHB and its predecessor (the Forest Practices Appeals Board) have consistently held that DNR has conditioning authority to prevent material damage to public resources.[16] These precedents draw upon DNR's statutory authority to condition applications and issue orders that prevent

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[10] WAC 197-11-360(1); WAC 197-11-402.

[11] WAC 222-10-010(4); WAC 197-11-660.

[12] WAC 197-11-350.

[13] *See* WAC 222-10-030; WAC 222-10-035; WAC 222-10-040; WAC 222-10-041; and WAC 222-10-042.

[14] *Yakama Indian Nation v. DNR*, Order Granting Summary Judgment at 4-5, FPAB No. 01-017 (2002) (denying landowner's contention that the FPAB lacked jurisdiction to review appellant Yakama's conditioning claim). The conditioning claim here concerned wildlife reserve trees and green recruitment trees. The PCHB took over the duties of the Forest Practices Appeals Board (FPAB) in 2010. Laws of 2010, ch. 210, §§ 1, 19-25. The PCHB still cites and relies on the FPAB's decisions, however.

[15] The only case mentioning WAC 222-20-120 indicates that when an operator disturbs cultural resources and failed to get an approved application, DNR is not authorized to charge the operator with civil penalties for both harvesting without an application *and* for violating the WAC 222-20-120 meeting requirement. *T.J. Henderson v. DNR*, FPAB No. 95-9, Final Findings of Fact, Conclusions of Law, and Order, Conclusion No. V (1995).

[16] *See, e.g.*, *Long v. DNR*, FPAB No 94-005, Final Findings of Fact, Conclusions of Law, and Order, Conclusion III (1994); *Confederated Bands & Tribes of the Yakama Indian Nation v. DNR*, FPAB Nos. 96-38 and 97-11, Final Findings of Fact, Conclusions of Law, and Order, Conclusion No. II (1998); and *City of Bellingham v. DNR*, PCHB No. 11-125 and 11-130, Order Granting Summary Judgment to Respondents at 17 (2012).

material damage to public resources.[17] The PCHB or a court would likely consider these prior conditioning decisions in interpreting WAC 222-20-120(4), even though there is no statutory basis for conditioning to protect cultural resources.

A few cases indicate that DNR's ability to condition applications is limited, even for the protection of public resources. In one of the cases cited above, the appellant believed that permit approvals were inappropriate when the marking of wildlife reserve trees and green recruitment trees did not occur before application approval. The FPAB determined that the pre-approval marking was not warranted because doing so would have conflicted with the legislative mandate in RCW 76.09.010(2)(d) to "promote efficiency by permitting the maximum operating freedom" to landowners consistent with the other purposes and policies in the FP Act. Given this mandate, "*any restrictive condition that is not warranted by the facts should not be lightly disregarded*."[18]

This case highlights that the purposes and policies in the FP Act are many, and even though a strong focus on public resources exists, that does not necessarily trump other legislatively established policies under the FP Act. It also highlights that in order for conditions to be valid, there must be some reason for the conditions specific to the site in question.

In a different case, DNR added conditions by a Notice to Comply after an application's approval to protect pileated woodpeckers and northern goshawk. The landowner challenged these conditions, which the FPAB struck down. The FPAB applied a narrow interpretation of what constitutes "material" damage to public resources as it concerned woodpeckers and goshawks. The FPAB found that material damage to wildlife only occurs when there is actual or potential harm to a *species*, not an individual or a pair of individuals.[19] Importantly, the FPAB determined that:

> what is "material" [damage to public resources] will vary with the facts of each case and the species at issue. In this context, the paramount concern is to ensure that the statute is interpreted consistent with its underlying policy . . . "to afford

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[17] RCW 76.09.050(4); RCW 76.09.080(1)(c); and RCW 76.09.090. DNR's ability to condition will be at its zenith when it implements a statutory source of authority, such as protecting public resources. As the cases below reveal, however, even DNR's ability to condition for potential harm to public resources is limited.

[18] *Yakama Indian Nation v. DNR*, Order Granting Summary Judgment, FPAB No. 01-017 (2002) (emphasis added).

[19] *Confederated Bands & Tribes of the Yakama Indian Nation v. Boise Cascade, DNR, and WDFW*, Final Findings of Fact, Conclusions of Law, and Order, Conclusion Nos. VI and VII, FPAB No. 96-38 (1998).

> protection to . . . wildlife" in a manner that is "coincident with maintenance of a viable forest products industry."[20]

These cases illustrate that DNR has limited, site-specific conditioning authority even when addressing a "public resource," a key statutory focus under the FP Act. However, "cultural resources" are not a "public resource," and the FP Act does not directly provide for the regulation of "cultural resources."

WAC 222-20-120(2) contains one mandatory duty for landowners – they must make a good faith attempt to meet to discuss a tribe's cultural resource concerns with a proposed forest practice, with the objective of agreeing on a plan for protecting the archeological or cultural value at the site. WAC 222-20-120(2) does not require the landowner to agree to a plan. That is consistent with the policies in the FP Act that promote cooperation.[21]

Whether a plan negotiated between a tribe and a landowner would be amenable to DNR's conditioning authority under the FP Act depends on the plan's contents and whether it strays from the issues regulated under the FP Act. If the negotiated plans included agreements on issues that DNR does not regulate, such as for the landowner to provide access, for the landowner to survey for archaeological resources, or for a landowner to fund a tribe's archaeological exploration, DNR conditions on those points would likely be unenforceable. DNR's application conditions must be tethered to its regulatory responsibilities under the FP Act.[22] If the plans involved protecting areas by removing them from the proposed operational area covered by the permit, this would be a permit term or condition that DNR could enforce.[23]

Outside of the Class IV-Special SEPA requirements discussed above, the Board's remaining rule structure concerning cultural resources consists mostly of voluntary measures. The use of voluntary measures follows the policies established by the Legislature in RCW 76.09.010(2) to

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[20] *Id*. at Conclusion of Law IX. The FPAB thus balanced policies among those stated in RCW 76.09.010. The words "viable forest products industry" and "afford protection to . . . wildlife" appear in RCW 76.09.010(1) and are reflected in the purposes and policies in RCW 76.09.010(2) (e.g., (2)(b) pertains to protecting public resources, while (2)(c) recognizes the public and private interest in the profitable growing and harvesting of timber).

[21] RCW 76.09.010(2)(f) and (i). Additionally, a private agreement between a landowner and tribe may be enforceable in court as a contract. A contract has potential legal consequences should performance not occur, while not all agreements have legal consequences. *Corbit v. J.I. Case Co.*, 70 Wn.2d 522, 531-37, 424 P.2d 290 (1967).

[22] Conditions on DNR-approved applications must also address specific issues, be visible to all interested parties who may review the proposal, and contain definite terms that do not require future studies or assessments. *SDS Lumber Co. v. DNR*, FPAB No. 98-5, Order Granting Summary Judgment, Conclusions of Law III, IV, and VI.

[23] *T.J. Henderson v. DNR*, FPAB No. 95-9, Final Findings of Fact, Conclusions of Law, and Order, Finding Nos. IV, IX, and XIII, and Conclusion Nos. II and III (1995) (harvests beyond permitted areas lacked approved applications and were subject to civil penalty under RCW 76.09.170).

ensure cooperation among landowners, tribes, and other public resource managers. The policies in the FP Act do not support mandatory conditioning for cultural resources.

CONCLUSION

Hopefully, this memorandum provides some guidance regarding the DNR's and the Board's authorities under the FP Act to require application conditions and will help align parties' expectations with statutory roles. Once this occurs, several options may be discussed to bring clarity to the plans developed under WAC 222-20-120 as well as the parties' various roles.

PMF:kk

T/F/W Cultural Resources Roundtable					12/15/2015	Changes from the previous report are in Red or Italics
Project Priority		Action Items	Lead	Status	Next Action	Relationship to the CRPMP
On-Going Tasks	1	The Roundtable will: (a) meet quarterly; (b) Report- to the FP Board at each regular meeting; (c) Review the CRPMP each year; (d) Report to the FP Board each August on progress of the CRPMP and implementation of WAC 222-20-120 during the previous FY *(e) suggest recommendations for modification to CRPMP*.	Co-Chairs	FPB meeting report due		Annual & quarterly obligation
	2	Give a CRPMP presentation at Regional TFW meetings as new CRPMP support material is released.	All	Next opportunity for TFW presentations after the 20-120 rule and supporting manual is passed by the FPB		Communication
		Create a Roundtable presentation about the CRPMP and Roundtable activities with a singular message and bullet points	Jeffrey and Jesse			
	3	Maintain an annual calendar of recurring Roundtable tasks and functions and post on DNR's website. Include FP Board report due dates, DNR regional TFW meetings and upcoming training opportunities. Emphasize accomplishments when communicating progress on implementing the CRPMP. Post examples of successes and cooperative opportunities on the DNR Forest Practices web site.	Jeffrey	Planning	Select calendaring software	CRPMP Support; Communication
	4	Contact individual FP Board members to "champion" CR Roundtable issues	All	Collaborate with current FP Board members regarding cultural resources issues coming to the Board.		Advance the Roundtable's work
	5	Individual caucuses will continue to support funding for a full time position at DAHP for the maintenance of CR data in support of the forest practices risk assessment tool.	Individual Caucuses	Currently the position has 1/2 time funding	Next opportunity is the *2014* Legislature	DNR Forest Practices Program support
	6	Seek funding for a CR Module pilot project		On hold	Waiting for the next opportunity	Board Manual Section 11 Appendix J

T/F/W Cultural Resources Roundtable					12/15/2015	Changes from the previous report are in Red or Italics
Project Priority		**Action Items**	**Lead**	**Status**	**Next Action**	**Relationship to the CRPMP**
High	1	Continue to review WAC 222-20-120 interpretations and DNR conditioning authority and develp recommendations for implementation. The Roundtable will begin with the following tasks:	Jeffrey, Karen, David, Sherri	Ongoing	*Identify specific issues and policy framework*	
		Presentations on 3 Models and Cultural Module	David, Robert Morgan Jeffrey	Completed	*Presentations at August and September meetings*	
		Review DNR's suggested Inadvertent Discovery language	Sherri, Marc	Scheduled	*Review language at ~~August~~ Novembermeeting*	
		Review additional watershed models	Jeffrey, Karen,	Beginning	*Discuss what additional models to review ~~in August.~~*	
High	2	Seek funding and staff support for the Roundtable's work		*Roundtable will bring a request to the FPB in May*	*Identify needs and potential resources*	
High	3	Prepare the cultural resource guidance documents and tools as agreed to in the CRPMP		Target completion date: *2015*		Educational Program and Commitments
		Scope the guidance/manual project to develop a detailed description and outline of the proposed guidance or manual.		Complete		
		Work products:1) Guidance for T/F/W stakeholders, 2) Guidance specific to forest landowners, and 3) Guidance specific to Tribes.	Jesse and Gretchen	In progress	Schedule work group in April to review completed drafts; prepare drafts on remaining sections	
		Post Roundtable guidance documents and other information and training material on the DNR Forest Practices web site		On going		
High	4	Investigate opportunities to develop training workshop curricula *and presentation* for private industrial foresters.	Jeffrey Karen	Planning	*Schedule work group in 2014*	An education component of the CRPMP
Medium	5	Develop a Logo for the Cultural Resources Roundtable	Jeffrey *and dAVe*	In progress	Draft logo under review	Publicity
Medium	6	CRPMP amendments to consider and further discuss:	All	Scoping	Members of the Roundtable will provide suggestions for amendments after the guidance document task is completed.	CRPMP Support
		Regarding MOUs, consider adding a statement specifying when DNR has a role in implementing MOUs and if there is a role, specifying its nature.				
		Under "Education Program and Commitments," modify #2 to recognize that agreements are often executed at the field level without the need for higher level contacts				
		Reference a role for the CRPMP in Forest Practices ID team deliberations and preparation of SEPA documents for Class IV Special FPAs	Jeffrey			
Low	7	Prepare a report to the Forest Practices Board on the impact to cultural resource protection and management when forest land is converted to another use and regulatory responsibility passes to local government (county or city)	Jeffrey and Karen	On hold	Wait for other higher priority items to be addressed	

T/F/W Cultural Resources Roundtable					12/15/2015	Changes from the previous report are in Red or Italics
Project Priority		Action Items	Lead	Status	Next Action	Relationship to the CRPMP
Completed Items	1	Cultural Resource Protection and Management Plan (CRPMP)		Completed 2003		
	2	Forest Practices Board adopted the rules recommended in the CRPMP		Completed 2005		
	3	Statutory exemption for sensitive cultural resource information gathered during a watershed analysis CR module or stand-alone CR module		Completed 2005		
	4	Updates to the CRPMP		Completed 2008		
	5	Recommendation to DNR staff and the Board for changes to the historic site definitions in Class III and Class IV Special definition to correct long standing interpretation issues		Completed 2008		
	6	A recommendation to include a cultural resource question on the Phase II 15-year small landowner permit application.		Completed Spring 2009		
	7	Draft a motion for the Forest Practices Board to request that the staff create a CR page on the Department's forest practices website		Complete (Board action was unnecessary)		
	8	With the support of the Commissioners Office, a Charter for the Timber/Fish/Wildlife Cultural Resources Roundtable (formerly known as TFW Cultural Resources Committee) delivered to the Forest Practices Board		Completed 2011		
	9	Consensus recommendation on changes to WAC 222-20-120 delivered to the Forest Practices Board		Completed 2011		
	10	As requested by the FPB, review and comment on a suggestion to amend 222-20-120 Sub-Section (3)(c))(i)		Completed 2011	Recommendation adopted by the Board in Feb, 2012	
	11	Prepare a streaming video of Lee Stilson's lecture on cultural resources that typically may be found in Washington's managed forests		Completed May 2012		
	12	In time for the FY 2012 report to the FPB, develop a method for formally assessing the performance CRPMP in accomplishing its purposes as stated on page 1 of the plan.		Completed June 2012		
	13	Two new cultural resource links have been added to the DNR Forest Practices webpage. Roundtable agendas, notes and action item list are on the Forest Practices Board's webpage		Completed September 2012		
	14	Improve knowledge, understanding and use of the GLO, historic and current USGS quad maps and other publicly available information to identify historic features recognized during 19th century land surveys.		Completed October 2012		Making available tools to improve identification and recognition of cultural resources in the field
	15	Update the instructions for question 7 of the forest practices application.	Sherri	Completed October 2013	Draft submitted to DNR for inclusion in the next update of FPA Instructions.	This would be an edit to Appendix B of the Cultural Resources Protection and Management Plan
	16	Follow the State Environmental Policy Act rule making by the Department of Ecology to draft rules to increase categorical exemptions.	Gretchen	Completed November 2014	*Ecology is recommending that Cultural Resource be considered as one of three top priorities for Phase 2 rulemaking.*	

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Department of Fish and Wildlife

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January 22, 2016

MEMORANDUM

To: **Forest Practices Board**

From: **Terry Jackson, Forest Habitats Section Manager**

Subject: **Upland Wildlife Update**

The following provides a brief status update for ongoing or pending actions pertaining to priority wildlife species.

Northern Spotted Owl
1988: State listed as endangered
1990: Federally listed as threatened
2012: Designation of revised critical habitat for the USFWS recovery plan

- The results of WDFW's draft periodic status review for the Northern Spotted Owl was presented to the Washington Fish and Wildlife Commission at its January 2016 meeting, along with recommendations for listing. An update will be provided to the Board at their February meeting.
- Summary of draft periodic status review: Because of the species' continued population decline, primarily from continued habitat loss due to forest harvest and fire, as well as competitive interactions with Barred Owls, it is recommended that the Northern Spotted Owl remain a state endangered species in Washington.

Western Gray Squirrel
1993: State listed as threatened
1996: Forest Practices Board established voluntary management approach

- The results of WDFW's draft periodic status review for western gray squirrel was presented to the Washington Fish and Wildlife Commission at its January 2016 meeting, along with recommendations for listing. An update will be provided to the Board at their May meeting.
- Summary of draft periodic status review: Because of the species' relatively small total population size, continuing threats, and a lack of information suggesting that any of the three populations have either reached the downlisting goals of the recovery plan or substantially declined since 2005, it is recommended that the western gray squirrel remain a state threatened species in Washington. Ongoing surveys will provide

information to better clarify current population levels and to assess the status of the species for the next scheduled periodic status review.

- WDFW staff continues to:
  - screen FPAs for possible impacts to western gray squirrels;
  - conduct nest surveys as needed, and work with landowners to develop voluntary management plans; and
  - track information on FPAs having potential impacts in order to better assess the effectiveness of the voluntary protection approach.

Fisher

1998: State listed as endangered
2014: Federally proposed to be listed as threatened
2016: Final decision on listing is expected on April 7, 2016

Current Status:

WDFW, along with USFWS and private and tribal stakeholders, has developed a draft Candidate Conservation Agreement with Assurances (CCAA). The draft is now going through the federal approval process, which includes a 30-day public comment period. WDFW and USFWS have worked closely with WFPA, small forest landowners, and interested tribes to develop appropriate conservation measures. After approval (hopefully in February 2016), landowners will then be able to sign on to the agreement, committing to the conservation measures for the species. By doing so, they will not be subject to additional requirements beyond those in the CCAA, should the proposed listing of the species become final in April of 2016 or at a later date. WDFW is currently conducting outreach. It is important that interested landowners be signed up prior to the impending listing decision in April. If the fisher is not listed in April, landowners will have more time to sign on to the CCAA. WDFW, along with federal and NGO partners, have started a multi-year project to reintroduce extirpated fishers to the Cascades part of its historic range. In November, releases have been and continue to be conducted in the South Cascades around Mt. Rainier. The fisher has already been successfully reintroduced in the Olympic National Park.

Future Updates to the Board

The forest practices rules require that when a species is listed by the Washington Fish and Wildlife Commission and/or the U.S. Secretary of the Interior or Commerce, DNR consults with WDFW and makes a recommendation to the Forest Practices Board as to whether protection is needed under the Critical Habitat (State) rule (WAC 222-16-080). WDFW and DNR continue to coordinate in order to anticipate federal actions and/or state action in response to changes in the status of a species.

cc: Penny Becker
Gary Bell
Marc Engel
Sherri Felix
Kevin Kalasz
Amy Windrope